



IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.2745/Mum./2016
(Assessment Year : 2007-08)

Dy. Commissioner of Income Tax
Central Circle-4(2), Mumbai
Central Range-4
Pr. CIT (C)-2, Mumbai

..... Appellant

v/s

Shri Umesh H. Gandhi
B/203, Goyal Shopping Arcade
S.V. Road, Borivali (W)
Mumbai 400 092 - AAUPG9305P

..... Respondent

C.O. no.289/Mum./2017
(Arising out of ITA no.2745/Mum./2016)
(Assessment Year : 2007-08)

Shri Umesh H. Gandhi
B/203, Goyal Shopping Arcade
S.V. Road, Borivali (W)
Mumbai 400 092 - AAUPG9305P

..... Cross Objector
(Original Respondent)

v/s

Dy. Commissioner of Income Tax
Central Circle-4(2), Mumbai
Central Range-4
Pr. CIT (C)-2, Mumbai

..... Respondent
(Original Appellant)

Revenue by : Ms. S. Padmaja
Assessee by : Shri Ajay R. singh

Date of Hearing - 21.02.2018

Date of Order - 28.02.2018

ORDER**PER SAKTIJIT DEY, J.M.**

The aforesaid appeal by the Revenue and the cross objection by the assessee arise out of order dated 1st January 2016, passed by the learned Commissioner (Appeals)-52, Mumbai, for the assessment year 2007-08.

2. The only issue arising for consideration in the aforesaid appeal and the cross objection revolves around deletion / addition on account of alleged on-money received by the assessee from sale of flats and shops.

3. Brief facts are, the assessee is an individual. A search and seizure operation under section 132(1) of the Act was conducted on 5th January 2007, at the business and residential premises of one Shri Gurinder Singh Bawa his family members and group concern. In the course of search operation a copy of agreement dated 24th March 2003, relating to a joint venture between Gunjoth Properties Pvt. Ltd. which is a family concern of Shri Gurinder Singh Bawa and the assessee was seized. On the basis of the seized document a survey under section 133A of the Act was carried out at the business premises of the assessee on 5th January 2007. Consequent to the survey proceedings, the assessee was summoned under section 131 of the

Act and a statement was recorded by him on 13th February 2007. During the recording of statement, when the assessee was called upon to explain the alleged discrepancies found on the basis of materials seized / impounded, he offered an amount of ₹ 75 lakh towards cash receipts on sale of shops in a project developed by him with another party viz. M/s. Guru Prerna Enterprises. In the return of income filed for the impugned assessment year in response to the notice issue under section 153C of the Act, the assessee also offered the amount of ₹ 75 lakh as undisclosed business income. The Assessing Officer on the basis of material on record found that as per the statement recorded from third party the on-money received in cash was about 40% in case of sale of flat and 60% in case of sale of shops. Whereas, the Assessing Officer found that the assessee has offered income of ₹ 75 lakh at 10% sale of shops only. Therefore, relying upon the statements recorded from third parties and also the fact that the co-developer has offered undisclosed income in the ratio of 60% in case of sale of shops and 40% in case of flats, the Assessing Officer proceeded to work out the undisclosed income derived by the assessee from sale of shops and flats at ₹ 2,80,25,655 and added back to the income of the assessee. Being aggrieved of the aforesaid addition made by the Assessing Officer, assessee preferred appeal before the first appellate authority.

4. On the basis of submissions made by the assessee, the learned Commissioner (Appeals) directed the Assessing Officer to examine the witnesses again and allow the assessee to cross-examine them. On perusing the remand report as well as the statement recorded from Rajesh Ahuja, during the remand proceedings and cross-examination of Rajesh Ahuja by the assessee the learned Commissioner (Appeals) found that there is variance between the statements recorded from Rajesh Ahuja initially and in the course of remand proceedings. He observed, in the statement initially recorded Rajesh Ahuja, never stated that there was cash component of 60% in shops and 40% in flats. Further, in the statement recorded during the remand Rajesh Ahuja admitted of not receiving any brokerage from the assessee. He also stated that the assessee never told him to collect a particular percentage in cash and balance amount in cheque. The learned Commissioner (Appeals) found that in the course of cross-examination by the assessee Rajesh Ahuja stated that he did not sell any shop or flats belonging to the assessee and he did not receive any brokerage from him. He also accepted that negotiation for cash was done by the developers only and he was not participating in any such negotiation as he used to sit outside. He also stated that he only used to quote the over all rate and not the cash component and cheque component. He stated that he started working for the project only from June 2006 and

that too with Shri Chetan Patel, partner of Guru Prerna Enterprises. He also stated that whatever statement he had given earlier was a general statement as he never used to participate in the negotiation. The learned Commissioner (Appeals) also found that no incriminating material or evidence was found in the course of search / survey either from the premises of Guru Prerna Enterprises or the assessee regarding receipt of cash on sale of flats and shops. He also observed that the other witness also never stated that the assessee received any cash on sale of flats and shops. It is the assessee who had accepted receipt of some unaccounted cash on sale of shops and specifically denied of having received any cash on sale of flats. Further, the assessee had stated that the flats / shops were sold much prior to Rajesh Ahuja, joined as a broker to sell the flats. The learned Commissioner (Appeals) found from record that by the time Rajesh Ahuja joined the project site the assessee had sold seven out of eight flats in his possession. Further, out of 67 shops, assessee had already sold 65 shops through other brokers. He, therefore, held that by placing too much reliance on the statement of Rajesh Ahuja, no addition could have been made. More so, when no evidence of receipt of cash was found at the time of search / survey. He observed, though, at the time of recording of statement from the assessee on 13th February 2007, the authorised officer was conscious of the

statement recorded from Rajesh Ahuja and Mnsukhbhai, he never called upon the assessee to explain why the cash amount supposed to have been received by the assessee should not be at par with the cash receipt declared by Guru Prerna Enterprises. The learned Commissioner (Appeals) held, merely on the basis of disclosure made by the partner of Guru Prerna Enterprises no addition could be made at the hands of the assessee as such disclosure of cash receipt related to sale of constructed area belonging to Guru Prerna Enterprises and not the assessee. Further, the learned Commissioner (Appeals) observed that going by the statement of Rajesh Ahuja, he had sold five flats and 8 to 10 shops and money earned on account of cash component on such sales could not have been more than ₹ 1.23 crore out of which assessee's 50% share could not have been more than ₹ 61 lakh. Against which the assessee has offered income of ₹ 75 lakh. Therefore, nothing more could have been offered by the assessee. Thus, it was held by the learned Commissioner (Appeals), the addition made by the Assessing Officer, could not be sustained. Having held so, the learned Commissioner (Appeals), however, observed that though receipt of cash component on sale of flats / shops could not be taken at the same level as of Guru Prerna Enterprises, however, considering assessee's own admission of receiving ₹ 75 lakh in cash, possibility of further cash receipt cannot be ruled out all together. Therefore, he

proceeded to estimate the total cash receipt on sale of shops / flats at ₹ 1 crore, the assessee having already offered an amount of ₹ 75 lakh the learned Commissioner (Appeals) sustained the addition of further amount of ₹ 25 lakh.

5. Learned Departmental Representative relying upon the observations of the Assessing Officer submitted that percentage of cash receipt can only be arrived at from comparable cases. She submitted, when the co-developers has disclosed cash component at 60% for shops and 40% for flats it is reasonable and logical to adopt the cash receipt by the assessee at the same rate. She submitted, the yardstick applicable to the co-developer would also apply to the assessee. She submitted, when it is established on record that on-money received by the co-developer is much higher than what was declared by the assessee, the learned Commissioner (Appeals) was not justified in deleting the addition made by the Assessing Officer. She, therefore, submitted that the addition made by the Assessing Officer should be restored.

6. Learned Authorised Representative submitted, Rajesh Ahuja, on the basis of whose statements, the Assessing Officer has made the addition was sole selling agent of Guru Prerna Enterprises and not the agent of the assessee. He submitted, when the assessee had sold the

flats and shops much prior to the appointment of Rajesh Ahuja as sole selling agent and much before he sold the flats on behalf of Guru Prerna Enterprises, merely on the basis of declaration of cash receipt made by Guru Prerna Enterprises no addition can be made at the hands of the assessee. More so, when no incriminating material evidencing cash receipt by the assessee was found either during the search or survey. Challenging the addition of ₹ 25 lakh sustained by the learned Commissioner (Appeals), the learned Authorised Representative submitted, when the learned Commissioner (Appeals) on the basis of material on record has given a categorical finding that there is nothing on record to suggest that the assessee had received cash component over and above ₹ 75 lakh declared by him the addition of ₹ 25 lakh on purely estimate basis is uncalled for, hence, should be deleted.

7. We have heard rival submissions and perused material on record. A careful reading of the impugned assessment order leaves no room for doubt that the basis for addition on account of cash receipt (on-money) is the statement recorded from Rajesh Ahuja stated to be the sole selling agent of Guru Prerna Enterprises, Shri Arun Sharma, Sales Executive of Rajesh Ahuja, and letter dated 3rd April 2007, issued by Guru Prerna Enterprises. Relying upon the statements recorded from the aforesaid persons and disclosure of additional income of ₹ 5 crore

by Guru Prerna Enterprises, the Assessing Officer concluded that the assessee must have received cash component at par with cash component received by Guru Prerna Enterprises on sale of flats and shops. It is evident, the Assessing Officer solely relying upon the aforesaid statements and letter of Guru Prerna Enterprises has made the addition without making any independent enquiry on his own to find out whether the assessee has actually received any on-money and, if received, the quantum of such on-money. As recorded by the learned Commissioner (Appeals) in the course of appeal proceedings, the Assessing Officer was directed to examine assessee's claim of non-receipt of on-money. In this context, the Assessing Officer examined Rajesh Ahuja, again and also permitted the assessee to cross-examine him. As rightly pointed out by the learned Commissioner (Appeals) neither in the initial statement recorded from him nor in the statement recorded during remand Rajesh Ahuja, ever stated anything about the quantum of on-money received viz. 40% for flats and 60% of shops. Further, though, in the statement recorded initially, Rajesh Ahuja, had stated that he was appointed as marketing agent for both the assessee and Guru Prerna Enterprises, however, in the course of his examination during the remand proceedings and cross-examination by the assessee, Rajesh Ahuja, clearly admitted that neither he was acting as an agent of assessee nor he received any brokerage from the

assessee. He admitted that he was appointed as an agent by Guru Prerna Enterprises only. Further, he also admitted that he never participated in the negotiation between the developers and prospective buyers regarding cash component and cheque component and he always quoted the over all price of the flat / shop. It is also a fact on record that before he joined the project site in June 2006 most of the flats / shops falling into the share of the assessee had already been sold through other brokers. Therefore, if the Assessing Officer wanted to ascertain the fact relating to quantum of cash component received by the assessee from sale of flats / shops he should have conducted independent enquiry either with the brokers who were appointed by the assessee to sell the flats / shops or with the buyers. It is a fact on record that the Assessing Officer has not conducted any such enquiry either during the assessment proceedings or during the remand proceedings. Solely relying upon the statement of the agent Rajesh Ahuja, and the declaration made by Guru Prerna Enterprises, the Assessing Officer had made the addition of cash component. When the assessee had demonstrated that the shops and flats sold by him were much prior to June 2006, the addition on account of cash receipt cannot be made simply on the basis of declaration made by Guru Prerna Enterprises. Admittedly, no incriminating evidence / material was found as a result of search either from the premises of the

assessee or Guru Prerna Enterprises, indicating cash receipt by the assessee. When the Assessing Officer has not conducted any independent enquiry of his own to ascertain the fact from the buyers or any other person involved in such transaction, the factum of cash component, merely on presumption and surmises no addition on account of on-money can be made. Therefore, the learned Commissioner (Appeals) having found that there is no evidence to indicate that the assessee has received any cash over and above what has been declared by him, even the addition made of ₹ 25 lakh purely on estimate basis cannot be sustained. Therefore, the entire addition made by the Assessing Officer in the instant case deserves to be deleted. Accordingly, we do so. Grounds raised by the Revenue are dismissed whereas grounds raised by the assessee in its cross objection are allowed.

8. In the result, Revenue's appeal is dismissed and assessee's cross objection is allowed.

Order pronounced in the open Court on 28.02.2018

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 28.02.2018

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Asstt. Registrar/Sr.P.S)
ITAT, Mumbai